

## **Item SPR06-03 Response Form**

**Title:** Appellate Procedure: Briefs and Petitions for Review (amend Cal. Rules of Court, rules 14, 16, 28, 28.1, 29.1, and 33)

- ☐ **Agree** with proposed changes
- ☐ **Agree** with proposed changes **if modified**
- ☐ **Do not agree** with proposed changes

Comments: \_\_\_\_\_

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\_\_\_\_\_

**Name:** \_\_\_\_\_ **Title:** \_\_\_\_\_

**Organization:** \_\_\_\_\_

☐ **Commenting on behalf of an organization**

**Address:** \_\_\_\_\_

**City, State, Zip:** \_\_\_\_\_

Please **write** or **fax** or **respond using the Internet** to:

**Address:** Ms. Romunda Price,  
Judicial Council, 455 Golden Gate Avenue,  
San Francisco, CA 94102  
**Fax:** (415) 865-7664      **Attention:** Romunda Price  
**Internet:** [www.courtinfo.ca.gov/invitationstocomment](http://www.courtinfo.ca.gov/invitationstocomment)

<b>DEADLINE FOR COMMENT:</b> 5:00 p.m., Friday, June 23, 2006
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Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

*Circulation for comment does not imply endorsement by the Judicial Council, the Rules and Projects Committee, or the Policy Coordination and Liaison Committee. All comments will become part of the public record of the council's action.*

Invitations to Comment (Proposal SPR06-03)

Title	Appellate Procedure: Briefs and Petitions for Review (amend Cal. Rules of Court, rules 14, 16, 28, 28.1, 29.1, and 33)
Summary	<p>This proposal would make several changes to the California Rules of Court relating to briefs in the Court of Appeal and the rules relating to petitions for review and briefs on the merits in the Supreme Court, including: (1) amending rules 14, 28.1, and 29.1 to permit parties to attach to their briefs and petitions for review copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible and to clarify that a copy of a an opinion required to be attached by rule 977(c) does not count toward the 10-page limit applicable to other attachments; (2) amending rules 28.1 and 29.1 to clarify that the word count limits on the length of briefs include footnotes; (3) amending rule 16 to clarify that, when a cross-appellant files a combined brief, the reply portion of the combined brief, not the whole combined brief, must focus on the issues raised in the applicable appeal; and (4) amending rule 33 to provide that if defendant's appointed appellate counsel fails to timely file an appellant's opening brief, the court must notify the appellant that appointed counsel will be relieved and new counsel appointed if the brief is not filed within 30 days.</p>
Source	Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair
Staff	Heather Anderson, Committee Counsel, 415-865-7691, heather.anderson@jud.ca.gov
Discussion	<p><i>Attachments to briefs and petitions for review</i></p> <p>Rule 14 specifies the form and content of briefs in the Court of Appeal. Subdivision (d) of this rule currently permits parties to attach to their briefs copies of exhibits or other materials in the appellate record. As the Advisory Committee Comment to this rule indicates, this provision is intended to improve the appellate process by allowing the brief writer, in appropriate cases, to focus the reviewing court's attention on especially significant or explanatory exhibits or other documents, and by relieving the court of the burden of finding those items in a lengthy record.</p> <p>Rule 28.1 specifies the form and content of petitions for review in the Supreme Court. Subdivision (e) of this rule also currently permits limited attachments to these petitions; parties may attach the opinion or order from which they are seeking relief and exhibits or orders of a</p>

trial court or Court of Appeal. Rule 29.1, which addresses briefs on the merits in the Supreme Court, does not specifically address attachments to briefs.

This proposal would expand the items that can be attached both to appellate briefs and to petitions for review. Under this proposal, in addition to the attachments currently permitted, parties could attach copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible. Like the current provision in rule 14, this new provision is intended to improve the appellate process by allowing the brief writer to focus the court's attention on especially significant statutes, rules, or regulations and by relieving the court of the burden of locating these items. This provision is similar to rule 28(f) of the Federal Rules of Appellate Procedure and rule 28-2.7 of the United States Court of Appeals for the Ninth Circuit, both of which permit parties to attach copies of relevant statutes, rules, and regulations to their briefs.

In addition, this proposal would clarify that the 10-page limit on attachments permitted under these rules does not apply to copies of opinions that must be attached under rule 977. Rule 977(c) requires that if a party cites an unpublished opinion or an opinion available only in computerized form in a brief or other paper filed with the court, the party must attach a copy of that opinion to the brief or paper. Currently, the Advisory Committee Comment to rule 14 provides that if the brief writer attaches a copy of an opinion under rule 977(c), that opinion does not count toward the 10-page limit on attachments. To prevent confusion, this proposal would incorporate that provision into the rule text. Rule 28.1(e) would also be amended to clarify that the permissible attachments to petitions for review include opinions required to be attached under rule 977(c). Finally, the amendments to both rules 28.1 and 29.1 would make clear that an opinion attached under rule 977(c) does not count toward the 10-page limit on attachments.

#### *Word count in petitions and briefs*

Rule 14(c) sets the maximum length of a brief filed in a civil case in the Court of Appeal. Since 2002, this rule has provided that a brief produced on a computer must not exceed 14,000 words, including footnotes.<sup>1</sup> Rule 28.1, relating to petitions for review, and rule 29.1, relating to briefs on the merits in the Supreme Court, similarly set the

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<sup>1</sup> Rule 33, relating to briefs in criminal cases in the Court of Appeal, and rule 36, relating to briefs in capital cases in the Supreme Court, also contain similar provisions setting the length of briefs at a specified number of words, including footnotes.

permissible length of these documents in terms of the number of words. Unlike rule 14(c), however, these rules do not specify whether the total permissible words include footnotes. The Advisory Committee Comment to rule 29.1 states that the length limit in this rule “tracks an identical provision in revised rule 14(c).” Similarly, the Judicial Council report recommending adoption of rule 28.1 states that the length limit provision in rule 28.1 “tracks an identical provision in rule 14(c).” Thus the intent was that the length limits established in rules 28.1 and 29.1 be identical to that in rule 14(c). This proposal would conform rules 28.1 and 29.1 to this original intent by specifically providing that the maximum number of words permitted under these rules includes footnotes.

*Reply portion of combined briefs*

Rule 16 provides that when there is a cross-appeal, a party that is both an appellant and a respondent must combine its respondent’s brief with its appellant’s opening brief or its reply brief, if any. Rule 16 also provides, however, that a party must confine a reply brief to points raised in its own appeal. This proposal would clarify the relationship between these two provisions by explaining that the reply portion of the combined brief, not the whole combined brief, must focus on the issues raised in the applicable appeal.

*Service of petitions for review*

Rule 28 addresses service and filing of petitions for review, among other things. This proposal would delete from rule 28 the provision stating that the proof of service must name each party represented by each attorney because rule 40.1, which sets out service and filing requirements applicable in all appellate proceedings, already establishes this requirement.

*Sanctions if appointed counsel fails to file opening brief*

Rule 33 establishes the requirements for appellate briefs in felony cases. This rule currently provides that if an appellant’s opening brief or respondent’s brief is not timely filed, rule 17 applies, except that the period for filing the missing brief is 30, rather than 15, days. Rule 17, in turn, requires that if an appellant’s opening brief is not timely filed, the reviewing court clerk must notify the party that the brief must be filed within the required period or the appeal will be dismissed.

The directors of several of the appellate projects that assist the court with appointed appellate counsel have suggested that dismissal is not the typical sanction employed by the court when a defendant is the appellant and is represented by appointed counsel. Instead, because the

court is ultimately responsible for providing indigent appellants with effective counsel, the court typically relieves the appointed counsel who has failed to timely file the brief and appoints new counsel to represent the defendant on appeal. This proposal would recognize this practice by specifically providing that the clerk must notify the appellant that appointed counsel will be replaced in such circumstances if the brief is not filed within 30 days of the clerk's notice. In addition, to make rule 33 easier to understand, the amendment would also replace the current cross-reference to rule 17 with the text from the relevant portion of rule 17.

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Attachment

Rules 14, 16, 28, 28.1, 29.1, and 33 of the California Rules of Court would be amended, effective January 1, 2007, to read:

**Rule 14. Contents and form of briefs**

(a)-(c) \*\*\*

**(d) Attachment to briefs**

A party filing a brief may attach copies of exhibits or other materials in the appellate record or copies of relevant local, state or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible. ~~The~~ These attachments, collectively, must not exceed ~~a total of~~ 10 pages, but on application the presiding justice may permit a longer attachment for good cause. A copy of an opinion required to be attached to the brief under rule 977(c) does not count toward this 10-page limit.

(e) \*\*\*

**Rule 16. Appeals in which a party is both appellant and respondent**

(a) \*\*\*

**(b) Contents of briefs**

(1) A party that is both an appellant and a respondent must combine its respondent's brief with its appellant's opening brief or its reply brief, if any, whichever is appropriate under the briefing sequence that the reviewing court orders.

~~(3)~~ (2) A combined brief must address each appeal separately.

~~(2)~~ (3) A party must confine a reply brief, whether filed separately or as part of a combined brief, to points raised in its ~~own~~ appeal.

**Rule 28. Petition for review**

(a) \*\*\*

**(b) Grounds for review**

The Supreme Court may order review of a Court of Appeal decision:

- (1) When necessary to secure uniformity of decision or to settle an important question of law;
- (2) When the Court of Appeal lacked jurisdiction;
- (3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or
- (4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

(c)–(e) \*\*\*

**(f) Additional requirements**

- (1) ~~The proof of service must name each party represented by each attorney served.~~
- ~~(2)~~ (2) The petition must also be served on the superior court clerk and the Court of Appeal clerk.
- ~~(3)~~ (2) A copy of each brief must be served on a public officer or agency when required by statute or by rule 44.5.
- ~~(4)~~ (3) The Supreme Court clerk must file the petition even if its proof of service is defective, but if the petitioner fails to file a corrected proof of service within five days after the clerk gives notice of the defect the court may strike the petition or impose a lesser sanction.

(g) \*\*\*

**Rule 28.1. Form and contents of petition, answer, and reply**

(a)–(c) \*\*\*

**(d) Length**

- (1) If produced on a computer, a petition or answer must not exceed 8,400 words, including footnotes, and a reply must not exceed 4,200 words, including footnotes. ~~Such a~~ Each petition, answer, or reply must include a

1 certificate by appellate counsel or an unrepresented party stating the  
2 number of words in the document. The person certifying may rely on the  
3 word count of the computer program used to prepare the document  
4

5 (2) If typewritten, a petition or answer must not exceed 30 pages and a reply  
6 must not exceed 15 pages.  
7

8 (3) The tables, the Court of Appeal opinion, a certificate under (1), and any  
9 attachment under ~~(f)~~ (e)(1) are excluded from the limits stated in (1) and  
10 (2).  
11

12 (4) On application and for good cause, the Chief Justice may permit a longer  
13 petition, answer, reply, or attachment.  
14

15 **(e) Attachments and incorporation by reference**  
16

17 (1) No attachments are permitted except:  
18

19 (A) An opinion or order from which the party seeks relief and;  
20

21 (B) Exhibits or orders of a trial court or Court of Appeal that the party  
22 considers unusually significant and;  
23

24 (C) Copies of relevant local, state, or federal regulations or rules, out-of-  
25 state statutes, or other similar citable materials that are not readily  
26 accessible; and  
27

28 (D) An opinion required to be attached under rule 977(c).  
29

30 (2) The attachments under (1)(A)–(C), collectively, do not ~~do~~ must not exceed a  
31 ~~total of~~ 10 pages.  
32

33 ~~(2)~~ (3) No incorporation by reference is permitted except a reference to a  
34 petition, an answer, or a reply filed by another party in the same case or  
35 filed in a case that raises the same or similar issues and in which a petition  
36 for review is pending or has been granted.  
37  
38

39 **Rule 29.1. Briefs by parties and amici curiae; judicial notice**  
40

41 **(a) \*\*\***  
42



1       **(b) Form and content**

2  
3       (1) Briefs filed under this rule must comply with the relevant provisions of  
4       rule 14.

5  
6       (2) The body of the petitioner's brief on the merits must begin by quoting  
7       either:

8  
9           (A) Any order specifying the issues to be briefed or, if none,

10  
11           (B) The statement of issues in the petition for review and, if any, in the  
12           answer.

13  
14       (3) Unless the court orders otherwise, briefs on the merits must be limited to  
15       the issues stated in (2) and any issues fairly included in them.

16  
17       **(c) Length**

18  
19       (1) If produced on a computer, a brief on the merits must not exceed 14,000  
20       words, including footnotes, and a reply brief on the merits must not  
21       exceed 4,200 words, including footnotes. ~~Such a~~ Each brief must include  
22       a certificate by appellate counsel or an unrepresented party stating the  
23       number of words in the brief. The person certifying may rely on the word  
24       count of the computer program used to prepare the brief.

25  
26       **(d) Supplemental briefs**

27  
28       (1) \*\*\*

29  
30       (2) A supplemental brief must not exceed 2,800 words, including footnotes,  
31       if produced on a computer or 10 pages if typewritten, and must be served  
32       and filed no later than 10 days before oral argument.

33  
34       **(e)–(g) \*\*\***

35  
36       **(h) Attachments**

37  
38       A party filing a brief may attach copies of relevant local, state, or federal  
39       regulations or rules, out-of-state statutes, or other similar citable materials that  
40       are not readily accessible. These attachments, collectively, must not exceed 10  
41       pages. A copy of an opinion required to be attached to the brief under rule  
42       977(c) does not count toward this 10-page limit.

1 **Rule 33. Briefs**

2  
3 **(a)–(b) \*\*\***

4  
5 **(c) Time to file**

- 6  
7 (1) The appellant's opening brief must be served and filed within 40 days  
8 after the record is filed in the reviewing court.  
9  
10 (2) The respondent's brief must be served and filed within 30 days after the  
11 appellant's opening brief is filed.  
12  
13 (3) The appellant must serve and file a reply brief, if any, within 20 days after  
14 the respondent files its brief.  
15  
16 (4) The time to serve and file a brief may not be extended by stipulation, but  
17 only by order of the presiding justice under rule 45.  
18  
19 (5) ~~Rule 17 applies~~ If a party fails to timely file an appellant's opening brief  
20 or a respondent's brief, ~~but the period specified in the notice required by~~  
21 ~~that rule must be 30 days.~~ the reviewing court clerk must promptly notify  
22 the party by mail that the brief must be filed within 30 days after the  
23 notice is mailed, and that failure to comply will result in one of the  
24 following sanctions:

25  
26 (A) If the brief is an appellant's opening brief:

- 27  
28 (i) If the appellant is the defendant and is represented by appointed  
29 counsel on appeal, the court will relieve that appointed counsel  
30 and appoint new counsel;  
31  
32 (ii) If the appellant is the defendant and is not represented by  
33 appointed counsel, the court, after notifying the defendant, will  
34 dismiss the appeal;  
35  
36 (iii) If the appellant is the People, the court will dismiss the appeal;

37  
38 (B) If the brief is a respondent's brief, the court will decide the appeal on  
39 the record, the opening brief, and any oral argument by the  
40 appellant.  
41

1           (6) If a party fails to comply with a notice under (5), the court may impose  
2           the sanction specified in the notice.

3  
4       **(d)–(f) \*\*\***